

***UNITED STATES – ANTI-DUMPING AND COUNTERVAILING  
MEASURES ON STEEL PLATE FROM INDIA***

**WT/DS206**

**Answers of the United States of America  
to the Panel's 26 February 2002 Questions**

**March 8, 2002**

**United States - Anti-Dumping and Countervailing  
Measures on Steel Plate from India**

**Questions for the Parties after the Second Meeting with the Panel**

**for the United States**

1. (a) **Would the United States please explain how it arrived at the conclusion that one percent of the U.S. sales reported by SAIL appear to be identical to the product upon which the normal value in the petition was based?**

1. The United States' conclusion – that one percent of the U.S. sales reported by SAIL appear to be identical to the product upon which the normal value in the petition was based – was reached by analyzing SAIL's final U.S. sales database, as submitted on September 1, 1999. To reach this conclusion, Commerce sorted the variable fields relating to actual plate specification, plate thickness, and plate width to identify the quantity of reported U.S. sales for which these three characteristics were identical to the product for which constructed value was calculated in the petition. Commerce then divided that quantity by the total quantity reported in the September 1, 1999, database. The resulting figure is less than one percent.

- (b) **Would the United States please explain in detail its objections to the analysis of Mr. Hayes supporting his statement that 30 percent of the merchandise reported sold to the United States is identical to the merchandise upon which the constructed value in the petition is based?**

2. The United States objects to Mr. Hayes' analysis for several reasons. First, Mr. Hayes' analysis is offered – in the form of an "affidavit" – as evidence, even though this analysis was never presented to Commerce and, therefore, is not part of the facts established and assessed by Commerce during the underlying investigation.<sup>1</sup> Pursuant to Articles 17.5(ii) and 17.6(i), the pertinent evidence on which the panel must base its review is the record established by the investigating authority at the time of its determination.<sup>2</sup> Here, Mr. Hayes' analysis was offered to

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<sup>1</sup> See U.S. Answers to the Panel's 25 January 2002 Questions, ¶¶ 12-14

<sup>2</sup> See *United States-Anti-dumping Measures on Certain Hot-Rolled Steel Products from Japan*, WT/DS184/R, adopted 28 February 2001, at paras. 7.6-7.7 ("It seems clear to us that, under this provision, a panel may not, when examining a claim of violation of the AD Agreement, in a particular determination, consider facts or evidence presented to it by a party in an attempt to demonstrate error in the determination concerning questions that were investigated and decided by the authorities, unless they had been made available in conformity with the appropriate domestic procedures to the authorities of the investigating country during the  
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the Panel for the first time in an affidavit presented with India's second written submission and his explanation as to how he conducted this analysis was offered – for the first time in this proceeding – orally to the Panel at the second meeting. For these reasons alone, Mr. Hayes' analysis, coming more than two years after the underlying investigation, should be rejected by the Panel.

3. Second, Mr. Hayes' analysis ignores Commerce's conclusion that SAIL's reported information was not verifiable because it failed the verification process. Mr. Hayes admits that errors discovered at verification required that he revise the September 1, 1999, database before he could reach his 30 percent estimation, but his revisions only correct for one of the errors. These manipulations are described as 1) correction of the width error first by scanning the 942 affected observations, then by manually changing the incorrect width values for all 942 observations; 2) isolating the correct "band" of products to be treated as identical to the product on which the constructed value in the petition was based; 3) applying the "banding" requirements to the product in the petition; and 4) sorting all of SAIL's data by grade, thickness and width in order to isolate the sales that matched the product in the petition.<sup>3</sup> Mr. Hayes estimates his time spent on step 1 at one half hour, although he does not explain how he "scanned the list of 942 observations listed in India Exhibit 13" to correct the September 1, 1999, database, which contains no observation numbers.<sup>4</sup> Mr. Hayes offers no estimations for the time involved in undertaking steps 2-4. In any event, the various theories and explanations offered by India only serve to reinforce the conclusion that only an ever-shrinking portion of SAIL's information may even have been theoretically usable. Moreover, even the theoretical use of this limited information would have posed undue difficulties, as significant changes would have to have been made to the U.S. database.<sup>5</sup>

4. Finally, the United States disagrees with the significance which India appears to attach to its 30 percent estimate. As noted above, India's estimate disregards Commerce's determination that SAIL's information – including the U.S. sales database – failed verification. India's estimate also fails to correct other significant errors in the U.S. database. India's conclusion also begs the question: what about the remaining 70 percent of SAIL's reported U.S. sales? Only SAIL – and perhaps India – know whether the exclusion of the remaining 70 percent of these sales benefits or is adverse to SAIL's interests. When an investigating authority relies on facts available, it is not

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<sup>2</sup>(...continued)  
investigation").

<sup>3</sup> Second Oral Statement of India at ¶¶ 57-61.

<sup>4</sup> *Id.* at ¶ 57.

<sup>5</sup> See, e.g., U.S. Answers to 25 January 2002 Panel Questions at ¶¶ 29-34.

possible to determine whether those facts are advantageous to the responding party because the information necessary to determine or even estimate that party's actual margin of dumping is not available. For these reasons, the 30 percent estimate arrived at by India is of questionable value at best.

5. It is worth recalling the test that India sought to establish at the outset of this case – namely, that the proper way to interpret Article 6.8 and Annex II of the AD Agreement is that “any category of information submitted by a respondent that is verifiable, timely submitted, in the requested computer format, and can be used without undue difficulty *must* be used by the investigating authorities in calculating an anti-dumping margin.” First Written Submission of India at ¶ 50. But India itself now admits that its U.S. sales “category” cannot be used; only a “sub-category” (30 percent) can even theoretically be used, and even then, this subset contains errors which have not been accounted for. Moreover, because of the inherent linkages between the U.S. database and the other necessary information, there may be additional errors that cannot be detected in the absence of the other information that SAIL did not provide.

6. In summary, in a case such as this, where the information provided by the respondent is untimely, unverifiable and cannot be used without undue difficulties, there is no obligation to use the little information that is provided to calculate a dumping margin, and a fair and objective administering authority could reasonably decline to do so. To read the AD Agreement as obliging an administering authority to use what little information has been provided would nullify the authorization in Article 6.8 that investigating authorities may make final determinations based on the facts available where the *necessary* information has not been provided. Moreover, such an approach would be inconsistent with the essential balance between the interests of investigating authorities and exporters reflected in the AD Agreement because it would place respondent exporters in total control of what data is used in the dumping calculation and make a meaningful investigative process impossible.

**(c) Is the normal value referred to in (a) above the same as the constructed value referred to in (b) above? If not, could the United States calculate what percentage of US sales reported by SAIL appear to be identical to the product upon which the constructed value in the petition was based?**

7. Yes. The normal value referred to in (a) above refers to the constructed value in the petition, which is the same normal value on which India based its analysis as described in (b) above. Thus, both analyses use the same basis for normal value, although the United States' conclusion that one percent of the U.S. sales database appear to be identical to this normal value is based on the final September 1, 1999, database as it was submitted by SAIL to Commerce, not as further revised recently by counsel to India.

**2. The United States indicated in its reply to the Panel's question number 10, that in order to use the US sales data submitted by SAIL, *inter alia*, "even for those sales**

for which the missing cost information was not needed - sales that matched identically and would require no adjustment for physical characteristics pursuant to Article 2.4 - US authorities would have been required to manually correct the physical characteristics for 75 percent of the sales just to be able to identify the identical sales" (emphasis added). Does this refer to correction of the miscoding of the width of product as 96 inches rather than over 96 inches, described in paragraph 30 of India's first submission and referred to in paragraph 5 of the Summary of significant findings in the verification report, Exhibit India-13 at page 5? Why does the United States consider that these coding errors would have to be corrected manually? How does this suggestion that it would be difficult or complex to make this correction of the coding error square with the conclusion in the determination of verification failure, Exhibit India-16 at page 5, that the errors in the US sales database detailed in the verification report "in isolation, are susceptible to correction"?

8. The Panel has asked three questions, which we address in turn.

9. First, the Panel is correct that the statement that "U.S. authorities would have been required to manually correct the physical characteristics for 75 percent of the sales just to be able to identify the identical sales" refers to correction of the miscoding of the width characteristics.<sup>6</sup> Commerce would have been required to review each observation in order to determine which observations contained errors requiring correction. The United States also noted that further corrections – freight cost, duty drawback errors, etc. – would also have to be made using the same process.

10. Second, as to why these coding errors would have to be corrected manually, the correction of these errors would require staff to review each observation to determine where corrections would need to be made. It should be noted that typically a respondent whose database contained errors would be required to correct and resubmit those databases so that Commerce could analyze the revisions; an investigating authority would not typically be required to make those corrections on its own. In this case, the record reflects – and Commerce concluded – that SAIL never provided usable databases.<sup>7</sup> Based on the information actually submitted in

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<sup>6</sup> U.S. Answers to Panel's 25 January 2002 Questions, ¶ 32.

<sup>7</sup> See, e.g., *Final Determination*, Ex. IND-17, at 73130 ("...SAIL has not provided a useable home market sales database, cost of production database, or constructed value database. Moreover, the U.S. sales database would require some revisions and corrections in order to be useable. As a result of the aggregate deficiencies (data problems and SAIL's responses), the Department was unable to adequately analyze SAIL's selling practices in a thorough manner for

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the underlying investigation, any analysis of SAIL's U.S. sales database would be limited to the database submitted on September 1, 1999, just prior to verification. In order to make just the necessary "coding" corrections, Commerce would need to review each individual observation and input the new information from Verification Exhibit S-8.<sup>8</sup>

11. Finally, Commerce's suggestion that it would be difficult or complex to correct the U.S. database is consistent with its conclusion that the errors in the US sales database "in isolation, are susceptible to correction." When the information submitted by a respondent in an anti-dumping investigation contains isolated errors, the correction of those isolated errors can typically be accomplished by the respondent without undue difficulties. The validity of the corrections can be tested once the respective databases are compared as part of the anti-dumping analysis. Such might have been the case with respect to SAIL if errors in its databases were limited to those that were identified in its U.S. sales database. The correction of such errors – again, typically accomplished by the respondent through the submission of a corrected database at an early enough point that it can still be analyzed and verified – could very well result in usable information that could be then compared as part of an anti-dumping calculation. But as vividly documented in the underlying record, the errors in SAIL's databases were not isolated to those in the U.S. sales database; SAIL concedes that usable home market, cost and constructed value databases did not exist. Therefore, while the U.S. sales database errors may have been "susceptible" or "able to be affected by" correction – though not without undue difficulty – such correction would have been meaningless in light of the magnitude of everything else that was missing from SAIL's databases. Moreover, the validity of such corrections could not be tested because there were no other databases against which it could be compared. The errors in the U.S. sales database could not be corrected without undue difficulties and – even if those errors were corrected – the data could not be used without undue difficulties because the other necessary information to calculate a dumping margin was missing. For these reasons, India is incorrect in its conclusion, Second Submission of India at ¶ 16, that the U.S. sales database was "easily capable of being used" in calculating a margin.

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<sup>7</sup>(...continued)

purposes of measuring the existence of sales at less than fair value for this final determination").

<sup>8</sup> Ex. IND-13.

3. Could the United States elaborate on its statement, at paragraph 12 (page 9) of its second oral statement, that "in determining the amount of time and effort required to use SAIL's information, an unbiased and objective investigating authority could reasonably conclude that it would involve a great deal of time and effort to address the unusable home market, export price, cost of production, and constructed value information and to identify any small pieces of data that might have been usable". Specifically, does the United States consider that the unusable home market, cost of production, and constructed value information would have to be addressed in evaluating whether the US sales price information submitted by SAIL, alone, could be used without undue difficulties. If so, why?

12. In its second oral statement, the United States noted that "in determining the amount of time and effort required to use SAIL's information, an unbiased and objective investigating authority could reasonably conclude that it would involve a great deal of time and effort to address the unusable home market, export price, cost of production, and constructed value information and to identify any small pieces of data that might have been usable." This statement was offered in response to a claim made by India that a determination as to whether SAIL's information can be used without "undue difficulties" must include consideration of the amount of information available to be used in calculating a dumping margin.<sup>9</sup> According to India, "if the information provided represents *one* entire component" of the anti-dumping equation – here, presumably, the export price data – then investigating authorities must make "considerable efforts" to use this information.<sup>10</sup> As the United States explained, there are several flaws in India's reasoning. First, the AD Agreement does not refer to "categories" of information, as India has subsequently acknowledged.<sup>11</sup> Further, the record demonstrates that SAIL did not even provide an *entire* database that did not contain significant flaws. While India claims that if the submitted information represents one entire "category" then the authorities must make "considerable efforts" to use it, that was not the case here. Thus, even if there was validity to India's standard (which the United States does not concede), the standard was not met in this case.

13. As the United States has explained, the more relevant inquiry is to examine – in determining whether SAIL's information can be used without "undue difficulties" – the amount

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<sup>9</sup> India's Second Written Submission at ¶ 18.

<sup>10</sup> *Id.*

<sup>11</sup> First Oral Statement of India at ¶ 34 ("The United States correctly points out that the term "category" is not a term found in the AD Agreement.").

of necessary information that is available to be used in calculating a dumping margin.<sup>12</sup> Given that the information necessary for the calculation of an anti-dumping analysis in this case – home market sales, export sales, cost of production data and constructed value data – was almost entirely lacking, it was reasonable – given the facts of this case – for an unbiased and objective investigating authority to conclude that it would involve a great deal of time and effort to address the unusable home market, export price, cost of production, and constructed value information, and to identify any small pieces of data that might have been usable.

14. This conclusion is particularly true given the explicit linkages between all of the “necessary information” needed to calculate an accurate anti-dumping margin, namely export prices, home market prices, cost of production, and constructed value, linkages that are reflected in SAIL’s own questionnaire responses. In SAIL’s export price response, for example, SAIL referred Commerce to its cost of production response – which SAIL and India concede was never usable – for cost information needed to measure differences in physical characteristics between products.<sup>13</sup> With such data missing, a fair and objective investigating authority could reasonably determine that the U.S. sales database – with or without its attendant errors – could not be used alone. The United States agrees with the statement of the European Communities that, in anti-dumping investigations, “different sets of data are linked and that failure to provide one part of such a set of linked data might make it impossible to use other data.”<sup>14</sup>

4. **Is it correct to understand that USDOC may (but is not required to) use, in making its determination, information that does not satisfy the requirements of section 782(e)(1)-(5)? If so, can the United States cite any case in which USDOC has done so?**

15. Yes, it is correct that Commerce may use – but is not required to use – information that does not satisfy the requirements of section 782(e)(1)-(5). One of the cases that Commerce submitted to the Panel demonstrates this point: *Polyester Staple Fiber from Taiwan*.<sup>15</sup> In that case, Commerce identified serious errors in the respondent’s revised database at verification; thus, Commerce was not able to verify certain information under section 782(e)(2). Nevertheless, Commerce used the information consistent with the principle – reflected in section

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<sup>12</sup> Comments of the United States of America on India’s 12 February 2002 Responses to Panel Questions (“U.S. Comments”), at ¶ 7.

<sup>13</sup> See, e.g., Ex. US-28.

<sup>14</sup> Third Party Oral Statement of the European Communities at ¶ 6.

<sup>15</sup> *Final Determination of Sales at Less Than Fair Value; Certain Polyester Staple Fiber From Taiwan*, 65 Fed. Reg. 16877 (March 30, 2000) and accompany Decision Memorandum, Exhibit US-26, at Issue 1 (*PSF from Taiwan*).



782(e)(3) – that the information was not so incomplete that it could not serve as a reliable basis for reaching the determination. Commerce explained that the respondent failed to submit entirely accurate and complete responses to its cost and sales database, but determined that the respondent's submissions had been timely, the majority of the information provided was accurate, the effect of the errors discovered at the verification of sales and costs were limited in scope and the impact of those errors on any potential dumping margin was small. The Department of Commerce explained that:

Errors discovered at verification are not, however, automatic grounds for the rejection of the whole of a respondent's reported data. As detailed in subsequent comments below, the errors discovered during the verification of FETL's sales and costs were limited in scope and their impact on any potential dumping margin was small.

*Polyester Staple Fiber from Taiwan*, Decision Memorandum at Comment 1. For these reasons, Commerce determined that the respondent's data, overall, "could be used without undue difficulties" and that "pursuant to section 782(e) of the Act, we do not find that [respondent's] information is so incomplete that it cannot serve as a reliable basis for reaching a final determination." *Id.*<sup>16</sup>

#### for India

5. **With reference to the discussion in paragraph 11, India's response to the Panel's question number 21, would India agree that if the investigating authority reasonably concludes that it would be "unduly difficult" in a particular case to fill in gaps in information submitted, then the investigating authority may reject the information submitted on the basis that it is not capable of being used without undue difficulty?**

16. In considering this issue, the United States recalls the statement that India made at the first Panel meeting (at ¶ 58):

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<sup>16</sup> See also *Hot-Rolled Flat-Rolled Carbon-Quality Steel Products from the Russian Federation*, 64 Fed. Reg. 38626 (1999)(Comment 2). In that case, Commerce found that the respondent's reported factors of production information could not serve as a reliable basis for reaching a determination pursuant to section 782(e)(3). Nevertheless, Commerce declined to use total facts available, instead using the respondent's reported factors of production information to calculate one weighted-average normal value and compared all U.S. prices to the single normal value. 64 Fed. Reg. at 38630. This decision can be viewed at <http://ia.ita.doc.gov/frn/9907frn/#RUSSIA>.

If a foreign respondent provided information on all export sales but did not provide information on a number of necessary characteristics of such sales (for example, their physical characteristics or the prices at which they were sold), the investigating authorities may be justified in finding that they cannot use that information without undue difficulty because it is too incomplete.

17. As the United States has noted, SAIL provided information on export sales but did not provide information on necessary characteristics of such sales, *e.g.*, the cost information required for any adjustments for physical differences. *See, e.g.*, U.S. Second Written Submission at ¶ 49. Therefore, by India's own reasoning, the investigating authorities "may be justified in finding that they cannot use that information without undue difficulty because it is too incomplete."

6. **India suggests, in its answer to the Panel's question 26, at paragraph 41, that a questionnaire respondent has sufficient incentive to cooperate because it knows that the information in the application, which may be used as facts available, represents the highest degree of dumping. Of course, the information in the application is gathered by the petitioner, and may, in fact, underestimate the degree of dumping. Would India agree that if the investigating authority has a basis for concluding that a questionnaire respondent is providing only partial information in order to avoid providing a basis for calculating a higher dumping margin than that alleged in the petition, an investigating authority may disregard information submitted? Or would India maintain that the investigating authority must use all information submitted that meets the criteria of paragraph 3 of Annex II even if the investigating authority finds the questionnaire respondent is attempting to manipulate the outcome.**

18. The United States respectfully submits that interpreting the AD Agreement to require an investigating authority to use partial information submitted by a respondent in cases where it finds that the respondent is attempting to manipulate the outcome would encourage such manipulation and result in the nullification of the rights of Members to take action to offset injurious dumping.

7. **Is it India's position that Article 6.8 precludes the use of "total facts available" in all circumstances if there is any information submitted that satisfies the requirements of paragraph 3 of Annex II? Would India agree that in some circumstances, the fact that some necessary information is not provided may justify a decision to reject information that, standing alone, satisfies the requirements of paragraph 3 of Annex II? Would India agree that in some circumstances, the fact that some necessary information is unverifiable may justify a decision to reject information that, standing alone, satisfies the requirements of paragraph 3 of Annex II?**

19. India has previously expressed the view that information that satisfies the requirements of

Annex II, paragraph 3, “must be used” regardless of any other circumstances. Putting aside the point that the text of Annex II, paragraph 3, states that information “should be taken into account” – not “must be used” – the United States has noted that the requirements of Annex II, paragraph 3 do not address the substance or quality of the information in question. U.S. Answers to 25 January 2002 Panel Questions at ¶ 63. India’s interpretation, to the extent that it requires an investigating authority to use information without regard to its substance or quality, is an interpretation that contradicts objective decision-making based on facts.

**8. Would India describe in detail what information it would consider in every case to be "necessary", in terms of Article 6.8, for an investigating authority to make an objective, unbiased, and accurate calculation of a dumping margin?**

20. The United States has expressed its view on this point in its First Written Submission at ¶ 83, and its Second Written Submission at ¶ 23.